MOTION FILED

JAN 8 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF PUBLIC SERVICE ELECTRIC & GAS COMPANY AND AMERICAN CYANAMID COMPANY AS *AMICI CURIAE*

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To The Honorable Chief Justice and Justices of The Supreme Court of the United States:

The motion of Public Service Electric & Gas Company and American Cyanamid Company respectfully shows to the Court:

1. Public Service Electric & Gas Company (hereinafter Public Service) is a New Jersey corporation and the eighth largest public utility in the United States. American Cyanamid Company is a New York based corporation engaged in the manufacture of chemicals and allied products with plants throughout the United States. The movants have participated in this case as amici before the United States Court of Appeals for the District of Columbia Circuit. In that court, the movants filed an extensive brief in support of the position of the National Labor Relations Board (hereinafter the Board). The movants have also participated as amici before the Board in its consideration of similar issues in *Local 438 Plumbers and George Koch Sons, Inc.*, 201 NLRB 59 (1973), and *Local 742 Carpenters (J.L. Simmons Company)*, 178 NLRB 351, enforcement denied and remanded, 444 F.2d 895 (D.C. Cir. 1971). In addition, the movants filed an amici brief and participated in oral argument in the Fourth Circuit's consideration of the *Koch* case. *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971). Respondent has declined its consent but does not oppose this motion. After discussion with the Office of the General Counsel consent by the Board appeared certain but was not pursued in view of Respondent's position.

2. The question before the Court is of vital concern to each of the moving companies and to the individuals and industries they service. The facilities of Public Service constitute a vital link in the interconnected system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service, which provides service to approximately six million people, is continously engaged in a program of construction and maintenance. Its construction program is an ongoing endeavor which will involve

the expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third facility utilizing nuclear power. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States.

3. The essential issue raised by this Petition is whether a union violates the secondary boycott provisions of the National Labor Relations Act when it induces its members to refuse to handle prefabricated goods that their employer's contract obligates the employer to install or utilize. As the construction work of Public Service and American Cyanamid is performed exclusively by union labor, the resolution of that issue will have a significant impact upon the labor cost which they incur and upon their decision to utilize such materials in the future.

4. As a public utility, the rates of Public Service are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Its obligation to avoid escalating construction costs, which must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which it must fulfill. Similarly, American Cyanamid in its obligation to its stockholders, employees and customers is also concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

5. Clearly the Board's approach to this issue recognizes the construction industry's critical need for technological development which is dependent in such large measure upon prefabrication. Rejection of that approach would severely impede Public Service and American Cyanamid,

as well as companies similarly situated, in their continuing struggle to keep pace with the needs of our society. Moreover, rejection of the Board's position will have an adverse radiating effect upon companies and their employees engaged in the manufacture of prefabricated materials. Accordingly, the participation of Public Service and American Cyanamid will provide an extra dimension to the arguments presented by the Board and Respondent as they will present to the Court the views of the purchasers of construction whose interest will be vitally affected by the Court's decision.

WHEREFORE, Public Service Electric and Gas Company and American Cyanamid Company respectfully move this Court for leave to file their joint brief as amici curiae in support of the Petition of the National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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Introduction

This brief on behalf of Public Service Electric & Gas Company and American Cyanamid Company, as *amici curiae*, is filed pursuant to leave of Court granted upon

motion made in accordance with Supreme Court Rule 42(1). It is in support of the Petitioner, the National Labor Relations Board.

Interest of Amici

Public Service Electric & Gas Company (hereinafter Public Service), the eighth largest public utility in the United States serving approximately six million consumers, together with American Cyanamid Company, (hereinafter American Cyanamid) a principal manufacturer of chemicals and allied products with plants throughout the United States, have participated in this proceeding as *amici curiae* before the United States Court of Appeals for the District of Columbia Circuit. They have also participated as *amici curiae* in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1971), a case in which the Fourth Circuit, contrary to the court below, approved the Board's "right-to-control" test in similar factual circumstances.

The question presented by this Petition is of vital concern to each of the moving companies and to the persons and industries they serve. Indeed its impact is such that it may properly be regarded as one of the most significant issues which the Court has been petitioned to hear in the field of construction labor law in recent years.

The facilities of Public Service constitute a vital link in the interconnected system known as the Pennsylvania-New Jersey-Maryland connection (PJM). In order to sustain its position in that system, Public Service has embarked upon a major and continuing program of construction and maintenance. Ultimately, this program will involve an expenditure of billions of dollars. For example, it is presently engaged in the construction of two multi-

million dollar nuclear generating stations within the State of New Jersey and is in an advanced planning stage for a third such facility. Similarly, American Cyanamid is continually engaged in construction projects at its plants throughout the United States. Both companies perform such construction exclusively with union labor.

The use of prefabricated materials in the making of repairs and in new construction is obviously of immediate and critical concern to Public Service and American Cyanamid, as well as to millions of other purchasers of construction. Moreover, the right of such purchasers to elect to use prefabricated materials free from fear of labor retaliation warrants judicial protection.

As a public utility, the rates of Public Service are subject to the closest possible public scrutiny and are inextricably intertwined with the public interest. Its obligation to avoid excessive construction costs, which must ultimately be borne by the consumer, and to provide the best possible service at the lowest possible cost, is a public trust which it must fulfill. American Cyanamid, in its obligation to its stockholders, employees and customers, is similarly concerned with both the cost of construction and the avoidance of labor disputes which inhibit and delay such projects.

The Board's approach to the issue presented is consistent with established principles of labor law and contributes to an economic atmosphere in which technological progress may be achieved. Rejection of that approach would severely impede Public Service and American Cyanamid as well as other purchasers of construction in their continuing struggle to keep pace with the needs of our society. Accordingly, *amici* strongly support the Petition of the National Labor Relations Board.

Reasons for Granting the Writ

1. It has long been recognized by this Court that the relationship of labor and management in the construction industry is *sui generis*. *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951). Labor relations in the construction industry are infinitely more complex than in the manufacturing industry. A manufacturer deals directly with the labor organization representing each and every one of its employees. Therefore, it may control its own destiny in the labor relations arena.

In contrast, the construction of a school, hospital, plant or a nuclear energy facility represents the combined efforts of many employers and their employees. Each subcontractor, whether it employs electricians, plumbers, steamfitters or members of another trade, must enter into a collective bargaining relationship with the particular craft union representing its employees. Thus, no single contractor, albeit the general contractor or a subcontractor, enjoys the unity of control over labor relations which is inherent in the manufacturing industry.

In a very real sense, a general contractor has no control over a subcontractor's labor relations and vice-versa. Therefore, when considered in the context of these multiple relationships, it is evident that a work preservation provision such as that contained in the collective bargaining agreement between Hudik-Ross Company, Inc. (hereinafter Hudik) and the Respondent herein must control only the relations of *that* employer with *its* employees. Such provision did not confer upon Hudik any degree of control over the decision of the purchaser of the construction, the Norwegian Christian Home for the Aged (hereinafter the Home), to utilize climate control units with prefabricated internal piping. It represented nothing more than

an agreement by Hudik not to use prefabricated materials *insofar as it was within its control not to do so*. Thus, as the Board and the Fourth Circuit held in *Koch, an* object of the union's pressure must necessarily have been secondary.

It appears the Home was influenced in its decision to use prepiped Slant/Fin control units by the fact that such units carried a one-year warranty *contingent upon the factory fabrication of the internal piping*. Nevertheless, regardless of the underlying reasons for the decision, and whether made by the Home independently or by its general contractor, the Austin Co., Inc., the work preservation provision of Hudik's contract could not radiate upward to influence or control that decision.

Over the years contractors have been confronted by the efforts of craft unions to radiate their control upward[1] or downward[2] for work to be done at the job site, or laterally[3] for supplies or equipment purchased off the job site but to be used at the situs of construction. Each of these efforts was designed to overcome the secondary boycott proscriptions of the National Labor Relations Act[4] (hereinafter the Act). While in some limited instances

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[1] *N.L.R.B.* v. *Local 164, I.B.E.W.*, 388 F.2d 105 (3rd Cir. 1968).

[2] *Construction Laborers* v. *N.L.R.B. (Colson & Stevens Construction Co.)*, 323 F.2d 422 (9th Cir. 1973), modifying 137 NLRB 1650); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975).

[3] *National Woodwork Manufacturers Assn.* v. *N.L.R.B.*, 386 U.S. 612 (1967).

[4] National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq.

these tactics have been sanctioned,[5] the principles established by this Court in *Denver Building Trades* remain a fixture of construction labor law.

In *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975), this Court pointed out that one of the major aims of the 1959 amendments to the Act was to limit "top down" organizing campaigns in which unions used economic weapons to force recognition from an employer regardless of the wishes of its employees. 421 U.S. at 632. Similarly, rejection of the Board's "right-to-control" approach would permit unlawful pressure from the bottom up to be placed upon a party which, by its inability to satisfy the union demands, is a neutral to the dispute. As pointed out by the dissenting opinion in the instant case "[T]he Union's dispute cannot logically be solely with the subcontractor but must instead be also with the party who dictates that prefabricated products shall be employed: the owner, the designer, the general contractor." *Enterprise Association Local 638* v. *N.L.R.B.*, 521 F.2d 885, 932, 933 (D.C. Cir. 1975). Such conduct traditionally has been construed as unlawful secondary activity regardless of whether the union may also have had a legitimate work preservation objective. *N.L.R.B.* v. *Denver Building Trades Council*, 341 U.S. 675 (1951); *N.L.R.B.* v. *Local 825 Operating Engineers*, 400 U.S. 297, 305 (1971).

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[5] In *Colson & Stevens*, 137 NLRB 1650 (1962), a unanimous five member Board, after extensive review of the legislative history of the 1959 amendments, concluded that Congress did not intend to change existing law with regard to the illegality of picketing to *obtain* and enforce so called "hot cargo" agreements. In *Northeastern Indiana Building and Construction Trades Council (Centlivre Village Apartments)* 148 NLRB 854 (1964) the Board regretably reversed *Colson & Stevens*. The Board's action in *Centlivre, supra*, has never been approved by this Court. See *Connell Construction Co., Inc.*, 421 U.S. 616, 633 footnote 14. Consequently the problems created by *Centlivre* remain with us and are reflected in the decision below.

2. Unfortunately, the District of Columbia Circuit and those circuits which concur in its view[6] proceed from the erroneous premise that the decision of this Court in *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967) justifies their conclusion. Such reliance is clearly misplaced. In *National Woodwork* this Court expressly declined to pass upon the Board's "right-to-control" test noting that it was not an issue in that case, as there the contractor (Frouge) *did* have the ability to grant the union's demand that the doors utilized be machined at the jobsite.[7] Significantly, prior to *National Woodwork* the District of Columbia Circuit as well as the Second, Sixth and Seventh Circuits had expressed their approval of the Board's view.[8]

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[6] *N.L.R.B. v. Local 164, IBEW*, 388 F.2d 105 (3rd Cir. 1968); *American Boiler Manufactures' Association* v. *N.L.R.B.*, 404 F.2d 556 (8th Cir. 1968); *Local 626, Plumbers* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir. 1970); *Local 742 Carpenters* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir. 1971); *Western Monolithics Concrete Products Inc.* v. *N.L.R.B.*, 446 F.2d 522 (9th Cir. 1971); *Compare Associated General Contractors of California Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975).

[7] *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 616, footnote 3 (1967).

[8] *Local 5, Plumbers* v. *N.L.R.B.*, 321 F.2d 366 (D.C. Cir. 1963) cert. denied, 375 U.S. 921 (1963); *Local 636, Plumbers* v. *N.L.R.B.*, 278 F.2d 858 (D.C. Cir. 1960); *N.L.R.B.* v. *Enterprise Ass'n.*, 285 F.2d 642 (2nd Cir. 1960); *Ohio Valley Carpenters District Council* v. *N.L.R.B.*, 339 F.2d 142 (6th Cir. 1964); *N.L.R.B.* v. *I.L.A., Local 1694*, 331 F.2d 712 (3rd Cir. 1964); *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 354 F.2d 594 (7th Cir. 1965), reversed on other grounds, 386 U.S. 612 (1967); *N.L.R.B.* v. *Local 157 Plumbers*, 369 F.2d 388 (7th Cir. 1966).

If anything is to be inferred from the Court's express refusal to pass upon this issue in *National Woodwork*, it is that the Court perceived a critical factual distinction in situations where control was absent. In any event, the conclusion does not follow that by declining to consider the Board's "right-to-control" test the Court rejected that criteria.

3. Only the decision of the Fourth Circuit in *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323, 327 (4th Cir. 1973), approving the Board's test and in direct conflict with the instant case, recognizes the express limitations of *National Woodwork* and the factual distinction between *National Woodwork* and *Koch*. The same distinction is present here. If indeed the teachings of *National Woodwork* are to be followed, the principle must be preserved that in distinguishing between lawful work preservation and unlawful secondary activity the "touchstone" is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer, vis-a-vis his own employees.[9]

Similarly, guidance may be found in this Court's decision in *Connell* which recognized the unlawful consequences which result when the lack of a contractor's "right-to-control" is ignored. For just as Connell, a general contractor, could not legally control the labor relations of its subcontractors, so too in the instant case Hudik could not control the selection of materials by the project general contractor. Hudik's agreement with the union, therefore, must be viewed as one wherein it agreed that *it would not on its own initiative elect to use* prefabricated materials *where not required to do so* by the job specifications.

[9] *National Woodwork Mfgs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 645 (1967).

To give broader reach to the Union's work preservation provision would not only permit an unlawful intrusion upon the right of Hudik to carry on its business with others, but would also permit the Union by secondary activity to intrude upon the relationships of the general contractor with the buyer and the buyer with the manufacturer. It is, therefore, clear that if the law of secondary boycotts is to be properly applied the Board's approach must be sustained.

4. The present conflict among the circuits in this critical area of labor law leaves purchasers of construction, such as amici, in a position where they must either forego the economic advantages of technological progress or incur the risk of labor difficulty and its concomitant delays and added costs. With the energy crisis facing our nation, power companies and others involved with meeting the needs of the public, should not be engulfed in squabbles between contractors and unions over how a particular job must be done, when, in fact, the overriding concern should be that the job be accomplished as efficiently and economically as possible. It is therefore of vital concern to Public Service Electric & Gas Co., other public utilities, American Cyanamid Co., other consumers of construction, and the public at large that the Court grant the Board's Petition.

CONCLUSION

The conflict among the circuits represented by the decision below and that of the Fourth Circuit in *Koch* leaves unsettled a vital interpretation of the National Labor Relations Act. Accordingly, the Court is respectfully urged to grant the Petition.

Respectfully submitted,

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